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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

BRIEF, *AMICUS CURIAE*, BY THE CITY OF NEW YORK ON BEHALF OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

October 6, 1954

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Preliminary Statement

The City of New York, a political subdivision of the State of New York, by its responsible and authorized law officer, the Corporation Counsel of The City of New York, sponsors this brief on behalf of the Board of Education of the City of New York. *Rules of the Supreme Court, Rule 42, subd. 4; New York City Charter, § 394.*

The Question Presented

The question presented is whether, pursuant to New York statutes and the practice followed thereunder, the use of public school buildings may be granted or withheld from individuals or groups, in the discretion of the local educational authorities without violating the applicant's freedom of speech and assembly.

The petitioner on behalf of his association had twice requested the use of a school auditorium in the City of Yonkers for the purpose of "arranging forums for the discussion of problems relating to peace against war." The Yonkers Board of Education denied these requests. The appellant contends that school buildings under certain conditions are in the same category as the public streets and accordingly the refusals of the Board were violative of the right of free speech guaranteed by the Federal Constitution.

In sustaining denials of the Yonkers board, the courts of New York State found that the petitioner had no clear legal right to the use of school buildings for public discussions and further found that the Yonkers Board of Education exercised its statutory discretion in a valid, proper and reasonable manner.

The Interest of the Amicus

The educational affairs of the City of New York are under the general management and control of the Board of Education of the City of New York. Pursuant to Education Law § 414 (Cons. Laws, Chap. 16), the governing boards of each school district within the State including the cities of New York and Yonkers are vested with discretion to grant or to refuse permission for the use of school buildings for certain specified purposes after regular school hours.

The Board of Education of the City of New York controls approximately 850 school buildings. Accordingly, it is vitally concerned in sustaining the decisions of the New York State courts as well as the long established

policy of the State Commissioner of Education, the chief administrative officer in educational affairs, which have recognized the right of local educational authorities pursuant to the statute to grant or withhold permission to use school buildings.

Summary of Argument

I

Education Law § 414 and the regulations adopted thereunder by respondents do not abridge freedom of speech or assembly. Under New York law public schools are not in the same category as streets and parks. The use of school buildings for other than the primary purpose of the education of children is a matter which may be constitutionally delegated to the discretion of local school authorities.

1. **Role of the State Commissioner of Education.**
2. **The constitutional rights of freedom of speech and assembly do not require that petitioner be granted use of school buildings.**

II

It would be inappropriate for this Court to pass upon the question of whether the regulations are unconstitutionally vague since this issue should in the first instance be reviewed by the Commissioner of Education. It would be equally inappropriate for this Court to pass upon the validity of the law and its implementing regulations since they have not been interpreted by the New York courts.

1. **The regulations are properly subject to review by the State Commissioner of Education.**
2. **The courts of New York State have not ruled on the validity of the statute and of the regulations.**

POINT I

Education Law § 414 and the regulations adopted thereunder by respondents do not abridge freedom of speech or assembly. Under New York law public schools are not in the same category as streets and parks. The use of school buildings for other than the primary purpose of the education of children is a matter which may be constitutionally delegated to the discretion of local school authorities.

The appellant as president of the Yonkers Committee for Peace had on two occasions requested the use of school buildings for the purpose of arranging forums for the discussion of problems relating to peace against war. In each instance the application was denied.

In his petition he alleges that permission was granted to other organizations to use the school buildings for the purpose of public assembly and discussion. He does not allege however that permission had been granted where objections to such use had been filed with the Board by the petitioner's group or by any other group, or where the Board of Education could reasonably have anticipated that the proposed forum or discussion would cause dissension among the people in the particular school district (R. p. 11). Nor does the appellant contend that the schools were the only suitable halls available for the purpose of holding the proposed meeting of his association.

To determine the legality of the Board's denial it is necessary to consider Education Law § 414 which governs the use of school buildings. (printed in Appendix A of this brief, pp. 20-21)

It is manifest from this statute that the primary purpose of the New York State Legislature in maintaining public school buildings is to provide free educational institutions for the children of our state. The responsibility for the entire educational system, including the necessary school buildings, has been vested in local school boards and boards of education throughout the State (Education Law § 414).

The State Legislature, recognizing that school buildings can serve a useful secondary function, has vested in each school district the discretion to permit the use of school buildings after school hours for certain limited purposes calculated to encourage the cultural, social, civic and recreational aspects of community life. The boards are authorized to promulgate apropriate regulations to implement the purposes of the statute.

Section 414 clearly indicates that each local board of education is cloaked with the responsibility and discretion to determine whether or not the proposed use of the school building carries out the purpose of this section of the Education Law. In no sense can it be said that the State Legislature has dedicated the school buildings for general public use. It has rather created a privilege to be exercised by each local board of education.

1. Role of the State Commissioner of Education.

The New York State public school system is founded upon a mandate in the New York Constitution to the State Legislature that it maintain and support a system of free common schools, wherein all the children of the State may be educated (New York Constitution, Art. XI, § 1). The Legislature pursuant to this directive provided for a public school system and, to assure the efficient operation of these schools, created the position of Commissioner of Education. The role of the Commissioner is well defined in *Matter of Bethlehem Union Free School* v. *Wilson*, 303 N. Y. 107 (1951), wherein the Court said at p. 114:

> "As to the commissioner's authority, the Constitution of this State empowers the Legislature to 'provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated' (N. Y. Const., art. XI, § 1); the Legislature has charged the Department of Education 'with the general management and supervision of all public schools and all of the educational work of the state';

and the chief administrative officer of the Department of Education is the commissioner (N. Y. Const., art. V, §§ 2, 4; Education Law §§ 101, 301)."

In addition to being the chief administrative officer, the Commissioner is vested with certain quasi-judicial functions pursuant to which he adjudicates problems arising in the operation of the public school system, (Education Law § 310). The broad latitude of these quasi-judicial powers is apparent from the provision that the decisions of the Commissioner shall be final and conclusive and not subject to court review. The Federal courts and the courts of New York State have repeatedly held that the practical construction given to a statute by those officials who are charged with its administration is entitled to great weight. *N. L. R. B.* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944); *Rochester Telephone Corp* v. *United States*, 307 U. S. 125, 146 (1939); *Mountin & Finishing Company, Inc.* v. *McGoldrick*, 294 N. Y. 104, 108 (1945); *Bullock* v. *Cooley*, 225 N. Y. 566, 571 (1919).

In New York State the question involved in this appeal—the use of public school buildings for other than the education of children—is not a novel problem engendered by the tensions of present world conditions. The Commissioner of Education, both by administrative directive and by quasi-judicial decisions, has established certain norms for the guidance of local school boards and boards of education in considering applications for the use of school buildings. The Commissioner, in the name of University of the State of New York, has prepared and distributed a bulletin known as Law Pamphlet No. 6, dated August 2, 1948, in which under the heading Policy To Be Followed (p. 7) he advises school officials against granting the use of school buildings for a forum or discussion which is likely to arouse objection or create dissension among the local taxpayers. (For the convenience of the Court we have printed a copy of this pamphlet in Appendix A pp. 22-31).

In the exercise of his quasi-judicial functions, the Commissioner has repeatedly sustained school boards in denying permission for the use of school buildings for topics of discussion calculated to engender local dissension or objection. For example, the Commissioner has sustained the refusal of a local board to permit the holding of a dance in a school hall to which non-residents would be invited and the purpose of which was the collecting of funds toward a war memorial (*Matter of Women's Civic Club of Katonah*, 31 St. Dept. Rep. 396 [1924]); similarly he upheld the determination of a local school board that the use of the school building by a civic organization whose membership was limited to residents of one village would result in ill feeling on the part of residents of other towns in that school district (*Matter of Pelham Manor Ass'n*, 36 St. Dept. Rep. 433 [1927]); he also sustained a local board which refused permission to a rent and taxpayers association to meet on school premises (*Appeal of Mauersberger*, 50 St. Dept. Rep. 501 [1935]). In this latter decision the Commissioner restated the principle which should guide local school officials, as follows:

> "There are many factors that may be properly taken into consideration by a board of trustees in determining whether it would permit the school property to be used for other than school purposes. The board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters of the district. Assuming that a use proposed is in itself legitimate, the board may still find that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism."

These same principles were followed in the comparatively tranquil period of the nineteen twenties. The Commissioner denied requests for the use of school buildings for discussions of topics admittedly controversial and which more properly belonged in the traditional forums of free

speech or in buildings available for such purposes. This ruling was enunciated in *Appeal of the American Civil Liberties Union.* 36 St. Dept. Rep. 87 (1926).

The Civil Liberties group advanced arguments strikingly similar to those urged by the present appellant. They insisted that so long as they were a civic group which allegedly fitted into the definitions of Education Law § 455 (now § 414), the Board of Education had no authority to consider the subjects proposed to be discussed at the meeting nor the identity of the speakers. Dismissing this argument, the Commissioner said:

> "The language of this section [§ 455 now § 414] clearly indicates that it was the intention of the Legislature that boards of education should control the program for Americanization as presented in these civic centers and forums, in the same manner as they control any other school activity. The Legislature never intended to throw the school buildings wide open as public forums where organizations and societies of every kind can assemble and discuss subjects of every nature."

The Commissioner's opinion sets community welfare as the true standard to be met before permission to use a school building may be granted, in the following terms:

> "* * * no matter how worthy the object or how just the cause for which the use of school buildings is sought, the use should not be granted if there is any probability that it will be resented by a considerable number of people of the district, village or city. It would be better to err on the side of exclusion than that of inclusion."
>
> * * * * *
>
> "The real question, then, is whether the use by American Civil Liberties Union of the Stuyvesant High School in the city of New York for a meeting to discuss 'Old Fashioned Free Speech' is such a use as will promote the welfare of the schools in that city, or whether it is such an activity as, like religion and politics,

should be debarred from the public schools and left to be sponsored by other institutions. Its answer involves no reflection upon the American Civil Liberties Union or any of its members. The denial of its request to use the high school building in no way impairs its right to apply for and procure other public places for exploiting its program. Undoubtedly there are many such places in the city of New York which can be had for the purpose of public discussions. The cause of free speech is in no way jeopardized by this refusal by the board of education."

The Commissioner made a similar ruling in *Matter of the Appeal of Teachers Union, Local 555 (U. P. W.)* 73 St. Dept. Rep. 41 (1952), wherein he sustained the action of the New York City Board of Education withdrawing from "Teachers Union" the privilege of holding its meetings on school premises. The Commissioner noted that many organizations and individuals had objected to the use of school buildings by this group. He ruled that the Board was not arbitrary in using this as a basis for denying the use of the school building.

From the language of the statute, as well as the long established policy and consistent interpretations of the Commissioner it is clear that the New York State Legislature had not so dedicated public school buildings for general public use so as to create a clear legal right in this appellant to use the Yonkers school buildings for its organization meetings.

A discussion of the petitioner's failure to establish a clear legal right appears in the Appellees' brief at pp. 7-8.

2. The constitutional rights of freedom of speech and assembly do not require that petitioner be granted use of school buildings.

A. The appellant, in the instant case, has conceded (App. Br. p. 14) that the State need not make public schools available for assembly and speech. He contends, however, that the State may not make school buildings available for

some public uses and not for others, without thereby violating the United States constitutional guarantees of free speech and assembly as well as due process.

In support of this position he cites a number of decisions such as *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), *Jamison* v. *Texas*, 318 U. S. 413 (1943) *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), *Niemotko* v. *Maryland* 340 U. S. 268 (1950) and *Kunz* v. *New York* 340 U. S. 290 (1950) in which this Court gave judicial recognition to the traditional use of the streets for the exercise of free speech and the exchange of ideas with one's fellowmen. The appellant relies also on a California case, *Danskin* v. *San Diego Unified School District* (S. Ct., 1946), 28 Calif. (2d) 536, 171 Pacific (2d) 885, which will be discussed and distinguished *infra.*

There can be no quarrel with the contention that generally speaking municipalities cannot bar the use of the streets for the dissemination of ideas, nor with the further premise that public officials may not by the unlimited exercise of license defeat the exercise of free speech and assembly on the public thoroughfares.

The public school buildings of New York State have not been dedicated by the State Legislature to the general public use which would class them with the public highways. The permitted uses are decidedly limited to certain definite purposes as were outlined *supra.*

B. To support his contention that public school buildings are public forums for free and untrammeled exchange of ideas, the appellant relies in the main on the decision of the Supreme Court of California in *Danskin* v. *San Diego Unified School District, supra.* The situations presented in the *Danskin* and in the present case are not all analogous. The appellant completely overlooks the essential difference in the statutory scheme for the use of school buildings in New York and in California.

In the *Danskin* case the Court said at p. 888:

> "Under the Civic Center Act, Education Code, §§ 19431-19439, the governing boards of school dis-

> tricts *must* grant the free use of school auditoriums for the purposes specified in section 19431 of the Education Code, * * *." (*Italics ours.*)

This general dedication of school buildings to public use is a very broad grant and leaves no room for the exercise of discretion by the local school boards. In direct contrast the New York Legislature (Education Law § 414) has sharply curtailed the use of school property for other than the education of children. The statute defines a limited list of permissible uses, but even as to those local school boards are vested with discretion to grant or refuse the use of buildings.

In the *Danskin* case p. 888, the California Court considered the constitutionality of the Civic Center Act, Education Code § 19432, which provides:

> "Any use, by any individual, society, group, or organization which has as its object or as one of its objects, or is affiliated with any group, society, or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means shall not be granted, permitted, or suffered."

The section further provides that the governing board of a school district could require the execution of an affidavit by an applicant for the use of school property in which the applicant would be required to swear that neither he nor any member of his organization was a member of a subversive group as defined in the section.

The majority of the Court ruled that such a requirement was in violation of the United States Constitution in that it constituted an infringement on freedom of speech without the establishment of a "clear and present danger" to the State.

It is to be noted that this decision was rendered in 1946 without the benefit of the subsequent holdings of this Court in such landmark case as:

Garner v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951) in which this Court sustained the constitutionality of a statute which required employees of Los Angeles County to swear (1) that they did not belong to an organization advocating the overthrow of the United States Government by force and violence; (2) that they had not been, and were not then, members of the Communist Political Association or the Communist Party.

American Communications Ass'n, C. I. O. v. *Douds*, 339 U. S. 392 (1950) in which this Court sustained a Congressional enactment which precluded from the benefits of the National Labor Relations Board those unions whose officials did not foreswear that they were members of the Communist Party or affiliated with such party and that they did not believe in, and were not members of or supported any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. This Court ruled that a reasonable relationship existed between the evil sought to be cured by Congress and the means taken to effect this result.

Dennis v. *United States*, 241 U. S. 494 (1951) in which this Court construed the constitutionality of the Smith Act and enunciated a definition of "clear and present danger" far more inclusive than the definition evolved by the California court in the *Danskin* case. Discussing *C I. O.* v. *Douds* this Court said that when Congress foreclosed the use of the facilities of the National Labor Relations Board to any union whose officers would not take an oath that they were not members of the Communist Party and did not believe in the overthrow of the Government by force and violence, it was not punishing beliefs but was regulating union affairs.

Similarly the Yonkers Board of Education has not limited this petitioners' right of free speech but rather is

merely regulating the use of school buildings under its control.

If the *Danskin* case had been appealed this Court may very well have found that the State Legislature could deny the use of school buildings, which are concededly in a different class than the streets, to those people who have as their objective the overthrow of the United States government by force and violence as speedily as the circumstances would permit.

POINT II

It would be inappropriate for this Court to pass upon the question of whether the regulations are unconstitutionally vague since this issue should in the first instance be reviewed by the Commissioner of Education. It would be equally inappropriate for this Court to pass upon the validity of the law and its implementing regulations since they have not been interpreted by the New York courts.

1. The regulations are properly subject to review by the State Commissioner of Education.

In the courts below the petitioner confined his attack to the assertion that (1) the act of the Yonkers Board of Education denying him the use of public school buildings was part of a design to discriminate against the petitioner and his organization; (2) the denial "violates the right of petitioner and the constituent members of his organization of freedom of speech and assembly guaranteed by the Constitution of the United States and denies them the equal protection of the laws in violation of the Constitution of the United States" (R. p. 12).

It is in this Court that the petitioner for the first time attempts to attack the validity of the regulations adopted by the Board of Education of the City of Yonkers regulating the use of school buildings. Nowhere in the petition submitted to the Special Term court did the petitioner contest the validity or the reasonableness of the regulations adopted. His only allusion to such regulations was to

allege their adoption whereby the use of school property by organizations was permitted (R. pp. 10-11).

It is apparent that the petitioner's theory of law at Special Term was not that the regulations were arbitrary or unreasonable in themselves but merely that the denial of his request made thereunder was an arbitrary action.

Examination of the briefs submitted in the Appellate Division, Second Department, and on a motion for leave to appeal to the Court of Appeals, reveals that no attack on the regulations themselves was made in either of these courts.

In his brief submitted to this Court the petitioner argues for the first time, that the regulations adopted by the Yonkers Board of Education are invalid and unconstitutional in that they reserve unlimited power and discretion to the Board to grant or deny requests for use of school property. (App. Br., p. 25).

It was demonstrated in Point I that the New York State Legislature created the position of Commissioner of Education to administer the state public school system and as part of this plan the legislature utilized the Commissioner's educational experience by vesting him with quasi-judicial powers. Education Law § 310 provides that any party believing himself aggrieved by an act or omission of school authorities "*may* appeal or petition to the commissioner of education" for redress (italics ours). (For the convenience of the Court the full text of Education Law §310 is printed in Appendix A of this brief, pp. 18-19).

As to the use of school buildings for other than school purposes, the New York Legislature saw fit to reserve exclusively to the Commissioner of Education the authority in the first instance to determine whether the regulations adopted by the school board carry out the intent of the legislature. This is expressed in that portion of Education Law § 414 which reads "Such regulations shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and *shall* be subject to review on appeal to the Commissioner of Education as provided by law" (italics ours).

The proper forum for the petitioner's attack on the Yonkers Board's regulations is before the Commissioner of Education. It is improper to raise this issue for the first time in this Court.

2. The courts of New York State have not ruled on the validity of the statute and of the regulations.

Even if this Court were to find that the petitioner could have tested the reasonableness of the statute and the regulations in the State courts, in the first instance, it would be inappropriate for this Court to pass, in this appeal, upon the constitutionality of Education Law § 414 and the regulations adopted pursuant thereto by the Yonkers Board of Education since neither the section nor the regulations have been interpreted by the Court of Appeals.

As was stated *supra,* the petitioner did not challenge the statute or the regulations as being unconstitutionally vague in any of the State courts. In neither the opinions nor orders of these courts does it appear that the vagueness of Education Law § 414 and the regulations adopted thereunder by the Yonkers Board of Education were discussed.

The State courts were not required to consider or determine the constitutionality of either the statute or the regulations as an alleged violation of free speech since the petitioner did not urge that the regulations themselves were in any way invalid. He merely urged that the application of regulations, presumably valid, in denying his petition, was a discriminatory and arbitrary act.

So far as we are aware, neither the Court of Appeals nor the Appellate Divisions of New York State have ever construed the constitutionality of Education Law § 414 and the regulations adopted by various boards of education in the State in so far as they affect the right of free speech.

It has been repeatedly held by this Court that where a constitutional issue involving the interpretation of a State statute is raised before it and such statute has not been decisively construed by the State courts, the Supreme

Court will refrain from passing on such constitutional issue until the statute has been authoritatively construed by State judicial decision *Asbury Hospital* v. *Cass County* 326 U. S. 207, 213-216 (1945); *Federation of Labor* v. *McAdory,* 325 U. S. 450, 460-462, 470-471 (1945); *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 546 (1914); *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350, 368-371 (1914); *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285, 293-294 (1935); *Minnesota* v. *Probate Court,* 309 U. S. 270, 276-277 (1940); Cf. *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 186-187 (1932); *Stephenson* v. *Binford,* 287 U. S. 251, 276-277 (1932).

In *Federation of Labor* v. *McAdory, supra,* wherein certain labor unions brought an action in the Alabama Courts for a declaratory judgment establishing the unconstitutionality of an Alabama statute regulating labor unions, this Court unanimously refused to pass upon the constitutionality of certain provisions of the act which were attacked as void for vagueness. The ground for this ruling was that such provisions had not been authoritatively construed by the State courts and that no application of the statute to a specific set of circumstances was involved. Further explaining its refusal to pass upon the constitutionality of the act, this Court observed (p. 471):

> "In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes."

Should this Court now undertake to pass upon the validity of Education Law § 414 as implemented by the regulations as allegedly abridging free speech, there would have been no prior opportunity for the New York courts to pass upon this claim of unconstitutionality. See for example, *Fox* v. *Washington,* 236 U. S. 273 (1915) wherein the construction given a penal statute by the highest State court was held to overcome the objection of vagueness. Cf. *Winters* v. *New York,* 333 U. S. 507 (1948).

CONCLUSION

The Courts below properly ruled that this petitioner had no clear legal right to the use of school buildings. If any question exists as to the vagueness of the regulations adopted by the Yonkers Board of Education, the petitioner has available to him an appeal to the Commissioner of Education of the State of New York. Accordingly, the order appealed from should be affirmed and this appeal dismissed.

New York, October 6, 1954.

Respectfully submitted,

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APPENDIX A

CONSOLIDATED LAWS OF THE STATE OF NEW YORK

CHAPTER 16

EDUCATION LAW § 310

Appeals or petitions to commissioner of education and other proceedings

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

EDUCATION LAW § 414

Use of schoolhouse and grounds out of school hours

Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, when not in use for school purposes, for such other public purposes as are herein provided. Such regulations shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the following purposes:

1. For the purpose of instruction in any branch of education, learning or the arts.

2. For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

3. For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be nonexclusive and shall be open to the general public.

4. For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings,

entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firemen.

5. For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no political meetings shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

6. For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be nonexclusive and open to the general public.

BULLETIN OF THE UNIVERSITY OF THE STATE OF NEW YORK

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Law Pamphlet 6

USE OF SCHOOL BUILDINGS

USE OF SCHOOL BUILDINGS

The Law

Primarily the use of school buildings out of school hours is governed by section 414 of the Education Law and section 4 of article XI of the New York State Constitution, which follow:

Education Law, § 414

§ 414 **Use of schoolhouse and grounds out of school hours.**

Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, when not in use for school purposes, for such other public purposes as are herein provided. Such regulations shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the following purposes:

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2 For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

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5 For polling places for holding primaries and elections and for the registration of voters, and for holding political meetings. But no political meetings shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

6 For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or

city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

Constitution, art. XI

§ 4 Use of public property or money in aid of denominational schools prohibited. . . . Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. . . .

AUTHORITY OF SCHOOL OFFICIALS

The trustee or board of trustees of a common school district and the board of education of a union free, central or city school district have sole authority to prescribe policies with respect to the use of school buildings. Under the present statute no association or organization is entitled *as a matter of right* to use the school building without the express permission of the board of education, and while the administration of the use of the school building is sometimes delegated to the superintendent of schools, principal or other agent, fundamentally the responsibility for its use is vested in the board of education or board of trustees.

Rental of School Buildings

The school district is created for the purpose of giving instruction to school children. The powers of boards of education are prescribed by statute, and boards may not exceed the powers specifically granted them. There is no power given to a board to become a landlord and rent its property except as stated below. The board may not legally divest itself of control over the school property and it is responsible at all times for its proper use. A lease evidently would restrict the board as to power of entry and otherwise and is consequently not possible under the present statute. This does not mean, however, that a board may not require organizations which are given the privilege of the use of the building to recompense the school district for expenses incurred. All organizations receive the use of the building only upon terms prescribed by the board and it may exact fees, irrespective of the purposes of the organization or the use to which the building is to be put. This charge is not a rental in any sense and is nothing more than a fee or reimbursement, as indicated, for expenses incurred in lighting, heating, janitor service etc.

The only exception from this rule is authorized by Laws of 1948, chapter 681, which amends section 402, subdivision 2, of the Education Law so as to allow leasing of school buildings in whole or in part, for residential purposes only, for one-year periods, where the school has been closed and during the five years necessary prior to its sale.

Insurance

Section 1604, subdivision 6, and section 1709, subdivision 8, require boards of education to carry fire insurance upon all school property. Failure of a board to carry proper insurance may give rise to possible personal liability for loss, and certainly much unfavorable criticism. When a board permits an organization to use the building, care must be exercised that the insurance policy is in

force and effect during such occasions and that the school district is properly protected at all times.

Use of the School Building in General

As indicated heretofore, the board of education has absolute discretion in refusing a use requested and in prescribing terms if the use is allowed. Its act in permitting or refusing organizations the use is reviewable upon appeal to the Commissioner of Education under section 310 of the Education Law. The law does prohibit the board from permitting uses for certain purposes such as religious, fraternal etc. The board, under section 414 ante, may not permit an organization to use the building if admission fees are to be charged, unless the proceeds, after deducting the actual expenses of the meetings, are to be devoted to an educational or charitable purpose. The statute makes two exceptions with respect to this matter. Veterans' organizations and organizations of volunteer firemen may be granted the use of the building even though the admission fees may be devoted to the use of these organizations.

Use for Political Purposes

Subdivision 5 of section 414 of the Education Law authorizes the use of a school building for a polling place for holding primaries and elections and for the registration of voters and for holding political meetings. No such use, however, may be permitted unless authorized by a vote at a district meeting, except that in cities the discretion is vested in the board of education.

Use for Fraternal and Religious Purposes

The various provisions of the State Constitution and the Education Law heretofore quoted prohibit the use of a school building for fraternal purposes or by organizations under the control of a religious denomination for religious instruction.

From time to time questions in relation to reading the Bible in school have come to the attention of this Depart-

ment. The following decision relates to religious instruction in the public schools:

No. 4860. Appeal of Doris L. McLennan, against District No. 1, Town of Geddes, Onondaga county; 65 St. Dept. 56

The record in this case shows that the public school children in the above-named school district were separated into two religious groups, and at 11 o'clock in the morning on each Tuesday and for the ensuing 45 minutes, in the school building, religious instruction was given to them.

Appellant does not desire that her child participate in religious instruction in the school building. Following her objection, the child was excused by the board of trustees but he was required to spend his time in the principal's office while instruction was being carried on in the school building in religion for the other pupils. Appellant objects to the use of the school building for the purpose of religious instruction. Her position is in accordance with the State Constitution and the statute and rules.

The use of a school building for religious instruction is prohibited by section 4 of article XI of the State Constitution.

Under the provisions of section 625, subdivision 2 of paragraph B, as amended by chapter 305 of the Laws of 1940, "Absence for religious observance and education shall be permitted under rules that the Commissioner shall establish."

Following the enactment of the above statute such rules were established by the Commissioner of Education and approved by the Regents on June 20, 1940. Rule number 1 provides:

> Absence of a pupil from school during school hours for religious observance and education to be had *outside the school building and grounds* will be excused upon the request in writing signed by the parent or guardian of the pupil.

It is clear, therefore, that under the provisions of the statute, any parent who desires that his child be excused for religious instruction may apply for an excuse for such

purpose following this rule. The instruction must be carried on outside of the school building, however.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the Board of Trustees of this school district refrain from carrying on religious instruction within the school building. The board will, however, be expected to make arrangements for excusing those pupils whose parents request the same for religious instruction elsewhere within the rules provided.

IN WITNESS WHEREOF, I, George D. Stoddard, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 24th day of April 1943.

[SEAL]

GEORGE D. STODDARD
Commissioner of Education

POLICY TO BE FOLLOWED

The following is a more recent decision of the Commissioner of Education upon an appeal regularly taken which discusses the use of school buildings and lays down many fundamental principles which boards of education and trustees will be justified in following:

IN THE MATTER
of the

Appeal of Oscar Mauersberger relative to action taken by the board of education of Union Free School District No. 6, of the town of Colonie, in failing and refusing to allow the use of the school auditorium for community meetings.

Decided by the Commissioner of Education, May 2, 1935

Oscar Mauersberger, a resident and taxpayer of Common School District No. 6 of the town of Colonie, county

of Albany, brings this appeal from the refusal of the board of trustees of such district to permit an organization, which the appellant calls the "Maywood Rent and Taxpayers Association in the Town of Colonie," the use of the school building for meeting purposes.

The use of school buildings outside of school hours is controlled by the provisions of section 455 of the Education Law, and under a long line of prior decisions it has been repeatedly held that the right to use the school building is within the discretion of the trustees or board of education, subject to the limitations prescribed for such use under such section. (*See Matter of District No. 4, Brighton, 32 State Dep't Rep't 319*). The board of trustees is not, however, bound by this statute to grant the use of school property even where such use falls within one of the permitted classifications. The board may exercise its discretion in determining whether or not any requested use for one or more of the purposes mentioned in the statute shall be granted. (*Matter of the Pelham Manor Association, 36 State Dep't Rep't 433*). It is only when the board has abused its discretion that its action may be reversed on appeal. (*Matter of Women's Civic Club of Katonah, Inc., 31 State Dep't Rep't 396, 397; also Matter of Vernon High School Alumni Association, 15 State Dep't Rep't 476*).

There are many factors that may be properly taken into consideration by a board of trustees in determining whether it would permit the school property to be used for other than school purposes. The board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters of the district. Assuming that a use proposed is in itself legitimate, the board may still feel that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism. (*Matter of Women's Civic Club of Katonah ante*).

Appellant avers that membership in the Maywood Rent and Taxpayers Association is open to any taxpayer or rent

payer living in Common School District No. 6 of the town of Colonie, county of Albany; that the meetings of said association are nonexclusive and are open to the public at large, except that it is necessary in order to belong to this organization that certain monthly dues be paid. As these dues, however, are nominal I do not think that such requirement of the by-laws is sufficient to make this organization an exclusive organization within the meaning of said section 455. The apellant, in commenting upon the purposes for which this organization is founded, declared it is not in any manner limited to matters relating to the school of the district or to the activities of the school board. Apparently any subject may be presented.

Where it has been determined by the board of education that the use of a building by an organization would arouse dissension in the community, it has never been my policy to interfere. I quote from Matter of Appeal of American Civil Liberties Union, 36 State Dep't Rep't 87, as follows:

> Schools are established and maintained for a definite and specific purpose, to wit, the secular education of the youth of the State, and any activity within the scope of that purpose or tending to promote the welfare of the schools and the community should be allowed and encouraged. On the other hand, any activity which is not embraced in the general school program and which is of a controversial nature liable to arouse ill feeling, jealousy or dissension, or to lead to misunderstanding, should be rigidly debarred. By pursuing this policy in the past our public schools have maintained the confidence and respect of all elements, classes, creeds and factions. The public schools are supported by the whole body of citizens; within their walls assemble the children of the rich and the poor, the children of parents of every shade of religious belief or unbelief. The children of almost every race and color. Therefore, nothing that will tend to foster intolerance, bigotry, animosity or dissension should be

allowed to inject itself into the public school system of this great State.

The board of trustees of this district defends its action on the ground that it is of the opinion that the use of this building by this organization would not be conducive to the welfare and well-being of the school district; it alleges, that its meetings serve for discussions of subjects which are of a highly controversial nature, few of which touch on matters affecting the school district; that some of its personnel are in the organization merely to vent personal grudges; that its roster of members is not representative of the rank a e of the district taxpayers. The board apparently bases these findings of facts upon prior meetings of this association. Where a board of trustees being familiar with local conditions feels that a contemplated use of a building is inimical to the best interests of the school district, I am loath to interfere.

Nevertheless where an organization composed of taxpayers of a school district wishes to use the building for a legitimate purpose, a board should not arbitrarily and capriciously refuse such use. I think the appellant, as president of the organization, may properly petition this board of trustees for the use of the school building for a meeting of this organization and in such petition he may specify the particular subjects and the matters to be discussed thereat. If on such presentation the president of the association can convince the board of trustees that the purposes to be discussed at a given meeting are not controversial and will be for the welfare of the community rather than for the purpose of promoting dissension, this board of trustees will undoubtedly, in the exercise of its discretion, permit the use requested.

The Appeal is Dismissed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

SUPPLEMENTAL BRIEF, *AMICUS CURIAE,* BY THE CITY OF NEW YORK ON BEHALF OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

This Court has Placed Public School Buildings in a Category Different from Public Streets or Parks.

An examination of the decisions of this Court in *Zorach* v. *Clauson*, 343 U. S. 306 (1952) and *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) shows very clearly that where school buildings are used for religious purposes the rule of law applied differs from the rule invoked where